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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. [redacted]103

CHARLES W. BAKER et al.,
Appellants,

v.

JOE C. CARR et al.,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

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INDEX.

	Page
I. Statement of issues on appeal	1
II. No substantial Federal question is raised by the attempted appeal	5
A. There is no denial of the right to vote	5
B. The Fourteenth Amendment does not guarantee equality of voting strength	7
III. The Civil Rights Act Amendments of 1957 are not applicable to this case	9
IV. This Court has consistently refused to exercise its equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength among its political subdivisions	14
V. This Court has previously refused to consider the same constitutional issues and contentions with respect to the identical Tennessee apportionment statutes involved in this suit	17
VI. This Court is without authority to grant relief	21
Appendix A—Constitution of Tennessee, Article II	27
Appendix B—Constitution of Tennessee, Article IV	29

AUTHORITIES CITED.

Cases.

Anderson v. Jordan, 343 U. S. 912 ..... 16, 20

Breedlove v. Suttles, 302 U. S. 277 7

Colegrove v. Green, 328 U. S. 549 .....7, 14, 15, 16, 17, 20, 21, 24, 25
Cook v. Fortson, 329 U. S. 675..... 15
Cox v. Peters, 342 U. S. 936..... 16

Dane v. Jackson, 256 U. S. 259..... 6

Hartsfield v. Sloan, 357 U. S. 916..... 17
Highland Farms Dairy, Inc., v. Agnew, 300 U. S. 608 24

Kidd v. McCanless, 200 Tenn. 273 at pages 275 to 277.18, 23
Kidd v. McCanless, 352 U. S. 920.....16, 17, 20

Luther v. Borden, 7 How. 1..... 8

MacDougall v. Green, 335 U. S. 281.....15, 16
Minor v. Happerset, 21 Wall. 162..... 7

N. C. & St. L. R. Co. v. Wallace, 288 U. S. 249..... 6
Nixon v. Herndon, 273 U. S. 536.....6, 21

Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U. S. 74..... 7

Radford v. Gary, 352 U. S. 991.....17, 20
Remmey v. Smith, 342 U. S. 916..... 16

Smith v. Allwright, 321 U. S. 649..... 21
South v. Peters, 339 U. S. 276.....16, 22

Terry v. Adams, 345 U. S. 461.....6, 21
Turman v. Duckworth, 329 U. S. 675..... 15

United States v. Classic, 313 U. S. 299..... 21
United States v. Cruikshank, 92 U. S. 542..... 6

Wood v. Broom, 287 U. S. 1..... 16

Statutes.

Public Law 85-315, Part III, Sec. 121, 71 Stat. 637.. 9
28 U. S. C. A. 1343 (4).....10, 13
42 U. S. C. A. 1971..... 13
42 U. S. C. A. 1985..... 11

Constitution.

Constitution of Tennessee:
Article II 2, 4, 27
Article IV 4, 5, 29

Miscellaneous.

United States Congressional and Administrative News, Eighty-fifth Congress, Vol. 2, pp. 1966-2015.....10, 12

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STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

The appellees, Joe C. Carr et al., for their statement in opposition to the appellants' statement of jurisdiction, and in support of their motion to dismiss, respectfully show the following:

I.

STATEMENT OF ISSUES ON APPEAL.

This action was brought in the United States District Court for the Middle Division of Tennessee by Charles W. Baker and other voters and residents of certain counties

in Tennessee against the Secretary of State, the Attorney General, the Co-ordinator of Elections, and the members of the State Board of Elections, seeking to challenge, under the equal protection and due process clauses of the Fourteenth Amendment, the existing legislative apportionment in Tennessee.

The Constitution of Tennessee, Article II, Sections 4, 5 and 6, directs the legislature at the expiration of each ten-year period after 1871 to make an enumeration of the qualified voters and to apportion the members of the legislature among the several counties or districts according to the number of qualified voters therein. It provides for ninety-nine members of the House of Representatives and thirty-three members of the Senate. No reapportionment has been made by the legislature since the Act of 1901, and the distribution of legislative seats remain substantially as provided for in that act.

The appellant averred that the legislative distribution is disproportionate to the distribution of population in the state, a condition brought about by shifts or changes in population since 1901, and that the result of the failure of the legislature to enact reapportionment legislation is an inequality of legislative representation, a debasement of their voting rights, and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. The appellants further averred that the inequality of representation has resulted in legislative discrimination against them with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power.

The appellants asked the District Court: (1) to declare the apportionment Act of 1901 unconstitutional and to enjoin its enforcement, (2) to order an election at large without regard to counties or districts, and (3) in the alternative to direct the appellees to hold an election in

accordance with the formula for legislative representation provided in the Tennessee Constitution, using the 1950 or a subsequent federal census to determine the number of qualified voters.

The appellees filed a motion to dismiss on the grounds that the District Court did not have jurisdiction of the subject matter of the suit, that the appellants had not stated a claim upon which relief could be granted, and that indispensable parties had not been joined.

The three-judge Court sustained the motion to dismiss and denied the relief prayed for, saying:

> "The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. **Colegrove v. Green,** 328 U. S. 549; **Cook v. Fortson and Turman et al. v. Duckworth,** 329 U. S. 675; **Colegrove v. Barrett,** 330 U. S. 804; **McDougal et al. v. Green,** 335 U. S. 281; **South et al. v. Peters,** 339 U. S. 276; **Remmey v. Smith,** 342 U. S. 916; **Anderson v. Jordan,** 343 U. S. 912; **Kidd v. McCanless et al.,** 352 U. S. 920; **Radford v. Gary,** 352 U. S. 991." 179 F. Supp. 826.

By the attempt to appeal to this Court, the only question raised is whether the appellants have been denied equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. They theorize that due to the increase and shifts in population, an elector's ballot is given more weight in

some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. In other words, they contend that some assembly districts are over-represented while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts. Relying upon the Federal population census of 1950, the appellants have alleged inequalities of representation although the State Constitution requires "an enumeration of qualified voters". Article II, Section 4, Constitution of Tennessee, Appendix A. Nevertheless, the appellants insist that a majority of the General Assembly represents less than a majority of the qualified voters. This, they say, is undemocratic and denies them a republican form of government. They contend that the concept of "majority rule" is so ingrained into our constitutional system that they are denied equal protection under the laws as guaranteed by the Federal Constitution.

Also, the appellants argue that since a minority of the qualified voters elect a majority of the Assembly that their right of franchise is debased so that they are denied the right of equal suffrage in free and equal elections. They now attempt to invoke the jurisdiction of this Court, although the question presented is purely political and legislative.

Significantly, the complaint fails to allege, and we do not understand that the appellants insist, that there is a prior valid apportionment law upon which to fall back if the present apportionment laws should be declared unconstitutional. There is no charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Article IV, Section 1, Appendix B. A lack of purity of the ballot box is not charged. There is no suggestion

that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the General Assembly are elected by less than a majority of the votes cast in the respective Assembly districts. Therefore, the appellants are exercising every right of franchise to which they are entitled under the Constitution. Notwithstanding this, the appellants insist that they are the subjects of invidious discrimination at the ballot box.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE ATTEMPTED APPEAL.

The appeal is based on the premise, which is completely false, that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment.

A. There Is No Denial of the Right to Vote.

The appellants do not charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Article IV, Section 1. They do not charge a lack of purity at the ballot box. There is no suggestion that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the legislature are elected by less than a majority of the votes cast in the respective legislative districts.

The gravamen of the appellants' complaint is that they do not have the opportunity to vote for as many members of the legislature as they think they should. Their only

contention is that due to the increase and shifts in population, an elector's ballot is given more weight in some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. They contend that some assembly districts are over-represented while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts.

In contrast, the cases relied upon by the appellants, **United States v. Cruikshank,** 92 U. S. 542; **Nixon v. Herndon,** 273 U. S. 536; **Terry v. Adams,** 345 U. S. 461, involve the denial of individual voting rights. The cases in nowise support the appellants' premise that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment.

General allegations relative to discrimination in the allocation of state taxes do not affect the basic question. **N. C. & St. L. R. Co. v. Wallace,** 288 U. S. 249; **Dane v. Jackson,** 256 U. S. 259.

The appellants' insistence that inequality of legislative representation is equivalent to a complete denial of the right to vote is specious. It is generally known that candidates for public office are frequently elected by less than a majority of the votes cast in an election where there are many candidates, or in situations where less than a majority of the electorate votes in an election. Speculation always arises in a presidential election year that one of the candidates may receive a majority of the popular vote but less than a majority in the electoral college.

It follows that the use by appellants of the terms "debased votes" and "diluted voting rights", are inaccurate and misleading. The appellants use the terms to characterize what they denominate as "rights" guaranteed by

the Fourteenth Amendment when, in fact, the sole complaint is the inequality of legislative representation.

In essence the question of inequality of legislative representation raises the issue of whether the appellants enjoy a republican form of government. The violation of this constitutional guaranty cannot be challenged in the courts. **Ohio ex rel. Bryant v. Akron Metropolitan Park District,** 281 U. S. 74; **Colegrove v. Green,** 328 U. S. 549.

Thus, no question of denial of the right to vote is presented on the record.

B. The Fourteenth Amendment Does Not Guarantee Equality of Voting Strength.

The Fourteenth Amendment does not guarantee equality of voting strength, and this Court has not so held.

The Court, in **Minor v. Happerset,** 21 Wall. 162, in considering whether the Fourteenth Amendment guaranteed rights of suffrage to all citizens, said:

> "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and state laws, and not directly upon the citizen." 21 Wall. 162.

The Court reaffirmed this view in **Breedlove v. Suttles,** 302 U. S. 277, saying:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as re-

strained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. **Minor v. Happerset,** 21 Wall. 162, 170 et seq., 22 L. Ed. 627, 629; Ex parte Yarbrough, 110 U. S. 651, 664, 665, 28 L. Ed. 275, 4 S. Ct. 152; **McPherson v. Blacker,** 146 U. S. 1, 37, 38, 36 L. Ed. 869, 878, 13 S. Ct. 3; **Guin v. United States,** 238 U. S. 347, 362, 59 L. Ed. 1340, 1346, 35 S. Ct. 926, L. R. A. 1916A, 1124." 302 U. S. 283.

Actually, the appellants, on pages 12 and 13 of their statement, concede that the Constitution of the United States "does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves."

It is likewise true that the power to enforce the guaranty of a republican form of government rests in Congress and not in the courts.

In **Luther v. Borden,** 7 How. 1, this Court said:

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government. . . . It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere." 7 How. 42, 43.

Since inequality of legislative representation is not an abridgement of the right to vote guaranteed by the Fourteenth Amendment, the premise upon which the appeal is based is false.

III.

THE CIVIL RIGHTS ACT AMENDMENTS OF 1957 ARE NOT APPLICABLE TO THIS CASE.

The appellants insist that they are entitled to relief under the provisions of the 1957 Amendment to the Civil Rights Act. Public Law 85-315, Part III, Sec. 121, 71 Stat. 637. The amendment simply states,

> "To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

According to the appellants, the thrust of this lawsuit is based upon the violation of their civil rights, and their right to relief must be found in the context of the amendment. Thus, it is said, that the case at bar differs from the plethora of other cases in which this Court has declared its want of jurisdiction and inability to grant relief.

This insistence by the appellants does not raise a substantial federal question. The principles announced in the former adjudications of this Court concerning state reapportionment problems are unchanged. It follows that for a number of reasons the 1957 Civil Rights Amendment does not aid the appellants.

First, historically this Court has never treated complaints about state reapportionment as falling within the orbit of civil rights. If disproportionate geographical representation in state legislative bodies could have been reasonably treated as a federally protected civil right, the statutes would have been invoked long ago. Thus, it is clear that reliance upon the civil rights statutes runs

counter to the experience of the courts in dealing with the problem.

Secondly, the phraseology in the amendment fails to encompass geographical reapportionment of state assembly seats. It is neither specifically nor impliedly mentioned or defined as a federally protected right. Although we do not concede that Congress may compel state reapportionment, there is nothing in the language used indicating that Congress so intended. On the contrary, it should be assumed that the Congress would have used appropriate and specific language in defining and setting forth reapportionment as a civil right. A fortiori "the right to vote" was so included. Certainly, it must be assumed that Congress was cognizant of the decisions of this Court, and would have clearly expressed its purpose to broaden the scope of the statute to include state legislative representation. The failure of the Congress to explicitly express itself in this field compels the conclusion that Congress had another purpose in mind.

Thirdly, the appellants have failed to properly construe the 1957 amendment. The applicable rules of construction, if it is necessary to resort to them, lead to the unmistakable conclusion that the apportionment of state legislative representation is not a civil right.

(1) The legislative history of the 1957 amendment is contrary to the insistence of the appellants. The treatment accorded the amendment by the Judiciary sub-committee in the House of Representatives indicates that the history of the amendment supports the position of the appellees rather than the appellants. United States Congressional and Administrative News, Eighty-fifth Congress, Vol. 2, pp. 1966-2015.

The majority reported that the purpose of the Civil Rights Act of 1957, of which 28 U. S. C. A. 1343 (4) was known as "Part III", to be as follows:

"The bill is designed to protect the civil rights of persons within the jurisdiction of the United States In order to accomplish that objective the bill provides the establishment of a bipartisan commission to investigate asserted violations of law in the field of civil rights which involve the right to vote and to make studies and recommendations of the legal developments and policies of the Federal Government with respect to the equal protection of laws under the Constitution of the United States. It also provides for an additional Assistant Attorney General, who would be in charge of a Civil Rights Division in the Department of Justice. The bill amends existing law so as to permit the Federal Government to seek from the civil courts preventive or other necessary relief in civil-rights cases. Finally, it proposes the enactment of new laws to assist in the enforcement of the right to vote."

The discussion of "Part III" emphasizes that it provided an additional remedy for the enforcement of "Civil Rights" in the three situations specified in 42 U. S. C. A. 1985. They include a right of action for damages against a person who conspires with an officer of the United States to injure or deprive another of his civil rights; an action for damages against any person who conspires to intimidate or injure parties, witnesses or jurors as to any action pending in a state court which denies one of due process or equal protection; and an action for damages against any one who conspires to deny one's right to due process or equal protection, or the right to vote in elections for federal officers (pp. 1974-5). Under Part III, the new remedy allows the Attorney General to institute an action in these instances where there is an injury or a threatened injury to civil rights in three categories mentioned. Within this range Congress authorized direct action in the federal courts without resort to state administrative and judicial tribunals. The unmistakable intent of Congress was to deal

with strengthening the existing civil rights statutes, and not to create or define a new civil right encompassing the problem presented in this case.

(2) The aims of Congress were clearly expressed as to the means of securing and protecting the right to vote. The majority of the sub-committee was acutely aware of the cases relied upon by the appellants, and cited most of them as authority for protecting the right to vote for federal officers. However, the report also notes the role of the states and declares:

> "Nothing contained in the proposal in any way infringes upon the power given to the states under the constitution to fix the qualifications of voters. It must be remembered that such power, however, is not unlimited, as indicated by the express power given to Congress to regulate the manner of conducting elections as well as by the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations" (Ibid. pp. 1977-8).

The minority of the sub-committee was mindful of the purpose and scope of "Part III." Again, the understanding was that there was an implementation of existing law by adding an additional remedy for securing and protecting civil rights (Ibid. pp. 2001-2). The discussion is devoid of any suggestion that the amendment was intended to do more than protect existing civil rights and the right of franchise.

(3) The Attorney General understood and intended that "Part III" implemented existing laws enacted for the protection of voting rights. He argued that there should be a civil as well as criminal remedy for interference or denial of the right of franchise. His objective was stated as follows:

> "Our ultimate goal is the safeguarding of the free exercise of the voting right subject to the legitimate power of the state to prescribe necessary and fair voting qualifications."[1]

The administrative construction of the amendment when pending in the Congress should be a polestar in ascertaining the object sought to be remedied. When this is coupled with the report of the majority of the sub-committee, the conclusion is inescapable that Congress was dealing purely with voting rights as distinguished from representation in a state legislature.

(4) The Congress clearly stated its purpose and intent in the amendment. The additional remedy was provided for protecting existing civil rights and the right to vote. The use of the phrase "including the right to vote" was not by inadvertence. It must be remembered that the Civil Rights Act of 1957 also amended 42 U. S. C. A. 1971 by adding subsections (b) (c) (d) and (e). These broadened the scope of 42 U. S. C. A. 1971 not only as to the character of the offenses included but contained additional remedies applicable solely to the statute. Since this was a special enactment about one phase of the civil rights problem, the courts might have construed the remedy as being exclusive and separate from the remedy provided in Part III. To obviate this construction, the Congress inserted language clearly embracing the right to vote as coming within the range of the remedy allowable under Part III.

Thus the Civil Rights Act Amendments of 1957, 28 U. S. C. 1343 (4), can have no application to this case.

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[1] Ibid. p. 1979, Letter dated April 9, 1956, addressed to the Speaker of the House of Representatives from Herbert Brownell, Jr., Attorney General.

IV.

THIS COURT HAS CONSISTENTLY REFUSED TO EXERCISE ITS EQUITY POWERS IN CASES POSING POLITICAL ISSUES ARISING FROM A STATE'S GEOGRAPHICAL DISTRIBUTION OF ELECTORAL STRENGTH AMONG ITS POLITICAL SUBDIVISIONS.

This Court has consistently refused to exercise its equity powers in cases involving political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. The character of the political question presented is not the same as in those cases where relief is granted for a private wrong.

In **Colegrove v. Green**, 328 U. S. 549, the question of the exercise of the equity powers of this Court to correct an improper apportionment of the congressional districts was squarely presented. The Court went directly to the heart of the matter and said:

> "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by considerations on the basis of which this Court, from time to time, has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." 328 U. S. 552.

The Court then pointed out:

> "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that

will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin,** 24 How. (U. S.) 66, 16 L. Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson,** 4 Wall. (U. S.) 475, 18 L. Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon,** 223 U. S. 118, 56 L. Ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

In **Turman v. Duckworth,** 329 U. S. 675, and **Cook v. Fortson,** 329 U. S. 675, the question presented was whether the county unit system of voting in Georgia deprived the plaintiffs of the equal protection of the laws. This Court ordered the District Court to dismiss the bill in each case.

Subsequently, the Court, in **MacDougall v. Green,** 335 U. S. 281, refused to exercise its jurisdiction where an Illinois statute required a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties. The Court referred to **Colegrove v. Green,** supra, and held that the statute was not in violation of the Fourteenth Amendment.

Georgia's county unit system of voting was again challenged in **South v. Peters**, 339 U. S. 276. This Court affirmed the District Court's action in dismissing the petition and said:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

In **Cox v. Peters**, 342 U. S. 936, another assault was made upon Georgia's county unit laws, and it was insisted by the petitioner that his vote had not received its full value in violation of the equal protection clause of the Fourteenth Amendment. The motion to dismiss was granted for want of a substantial federal question.

In **Remmey v. Smith**, 342 U. S. 916, the District Court had refused to enjoin the enforcement of the Pennsylvania apportionment laws, and had rejected the insistence that those laws violated the due process and equal protection clauses. This Court granted the motion to dismiss the appeal on the ground that it presented no substantial federal question.

The question of the geographical distribution of electoral strength was next before this Court in **Anderson v. Jordan**, 343 U. S. 912, on an attempted appeal from the decision of the Supreme Court of California. The appeal was dismissed on the authority of **Colegrove v. Green**, supra; **MacDougall v. Green**, supra, and **Wood v. Broom**, 287 U. S. 1.

In **Kidd v. McCanless**, 352 U. S. 920, the appeal involved the identical apportionment statutes now before the Court. The appeal was dismissed on the authority of **Colegrove v. Green**, supra, and **Anderson v. Jordan**, supra. The case will be discussed further in this statement.

This Court affirmed the District Court's dismissal of the action in **Radford v. Gary**, 352 U. S. 991, where it was contended that the Oklahoma apportionment laws were in violation of the Constitution of the United States. The Court cited **Colegrove v. Green**, supra, and **Kidd v. McCanless**, supra.

The Court likewise refused to consider the question of geographical distribution of electoral strength in **Hartsfield v. Sloan**, 357 U. S. 916. The Court was of the opinion that the motion for leave to file a petition for writ of mandamus to compel the District Judge to assemble a three-judge court to pass on the validity of the Georgia county unit law should be denied.

Thus, this Court has consistently, and without exception, refused to exercise its equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.

The appellants' assertion that the present appeal presents a case of first impression is without foundation and rests solely upon the false premise that inequality of legislative representation is an abridgement of the right to vote guaranteed by the Fourteenth Amendment. This insistence has previously been rejected by this Court.

V.

THIS COURT HAS PREVIOUSLY REFUSED TO CONSIDER THE SAME CONSTITUTIONAL ISSUES AND CONTENTIONS WITH RESPECT TO THE IDENTICAL TENNESSEE APPORTIONMENT STATUTES INVOLVED IN THIS SUIT.

Contrary to the appellants' assertion, the appeal presented on the record herein is not unique on its facts nor does it present a case of first impression.

This Court has previously refused to consider the same constitutional issues and contentions with respect to the identical Tennessee apportionment statutes involved in this suit.

In 1955 a similar suit was filed in the Chancery Court of Davidson County, at Nashville, Tennessee, and subsequently appealed to the Supreme Court of Tennessee. That Court in **Kidd v. McCanless**, 200 Tenn. 273 at pages 275 to 277, summarized the allegations in the bill as follows:

> "The suit was filed on March 8, 1955, by Gates Kidd and four other voters and residents of Washington County, Tennessee, along with six voters and residents of Carter County, and two voters and residents of Davidson County, against the Attorney General of Tennessee, the Secretary of State, the members of the State Board of Elections, the members of the Republican State Primary Election Commission, the members of the Democratic State Primary Election Commission, the members of the Washington County Election Commission, the Carter County Election Commission, and the Davidson County Election Commission. By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made

in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 to 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 to 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct the elections for members of the General Assembly according to said Act unless they are restrained by the court.

"The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the alternative the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with

the decree mathematically reapportioning the State." 200 Tenn. 275 to 277.

The Supreme Court of Tennessee, in dismissing the bill, said:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

A petition was filed seeking to have this Court review and reverse the action of the Supreme Court of Tennessee. The appeal was rejected in **Kidd v. McCanless**, 352 U. S. 920.

In rejecting the appeal, this Court cited **Colegrove v. Green**, supra, and **Anderson v. Jordan**, supra.

Thereafter this Court cited **Kidd v. McCanless**, supra, along with **Colegrove v. Green**, supra, as authority for its action in affirming the judgment of the three-judge District Court in dismissing the complaint in **Radford v. Gary**, supra.

It is submitted that the action of this Court in rejecting the appeal in the Kidd case upon the authority of **Colegrove v. Green**, and in relying upon the Kidd case as authority for affirming the District Court's judgment in **Radford v. Gary**, virtually requires the dismissal of the present appeal on the ground of res judicata.

It likewise follows that the appellants' assertion that the appeal is unique on its facts and presents a case of first impression is without foundation.

VI.

THIS COURT IS WITHOUT AUTHORITY TO GRANT RELIEF.

This Court is without authority to grant relief not only because the issue is political in nature but also because it is peculiarly political in nature.

The character of the political question presented is not the same as in those cases where relief is granted for a private wrong. The civil rights cases relied upon by the appellants, **Nixon v. Herndon,** supra; **United States v. Classic,** 313 U. S. 299; **Smith v. Allwright,** 321 U. S. 649; and **Terry v. Adams,** supra, involved denial of the right to vote at the polls or a lack of purity of the ballot box. In those cases the Court was concerned with the denial of individual voting rights.

In contrast, the question presented by the attempted appeal in this case affects the people of Tennessee as a body politic, and this is emphasized by the fact that certain municipalities are parties to the suit.

This distinction was recognized in **Colegrove v. Green,** supra, where this Court stated that the basis of the suit is

> "a wrong suffered by Illinois as a polity."

In **Colegrove v. Green,** the Court said:

> "We are of opinion that the petitioners ask of this court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard fo. the effective working of our

government revealed this issue to be a peculiarly political nature and therefore not meet for judicial determination." 328 U. S. 552.

And the Court continued:

"To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin,** 24 How. (U. S.) 66, 16 L. ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson,** 4 Wall. (U. S.) 475, 18 L. ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon,** 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

Again in **South v. Peters,** supra, the Court said:

". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

The wisdom of the rule is emphasized when considered in its application to the case now before the Court.

In **Kidd v. McCanless**, 200 Tenn. 273, the Supreme Court of Tennessee said:

> "It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the de facto doctrine cannot be applied to maintain the present members of the General Assembly in office. . . . Therefore we would not only not have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members of the General Assembly." 200 Tenn. 281.

The Supreme Court of Tennessee then held:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

Thus the Supreme Court of Tennessee has decided that if the apportionment laws are held unconstitutional the State itself will be destroyed. This would necessarily result if the General Assembly is declared to be non-existent. Thereby, the basic framework of constitutional government in Tennessee would be destroyed. Instead of having three departments of government, the State would be reduced to two. Consequently, a democratic form of constitutional government as guaranteed by Article IV, Section 4, Constitution of the United States, would end by a decision of this Court.

Despite the holding of the Supreme Court of Tennessee in **Kidd v. McCanless**, the appellants insist that this Court is not bound to accept the finding of the Tennessee Court that an invalidation of the 1901 Apportionment Act would

prevent the legislature from functioning in a de facto capacity to enact new apportionment legislation. The appellants cite no authority to support this assertion. This insistence is without precedent or reason and is directly in conflict with the holdings of this Court.

In **Highland Farms Dairy, Inc., v. Agnew**, 300 U. S. 608, this Court said:

> "A judgment by the highest Court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere." 300 U. S. 613.

What more serious question involving a state constitution could there be?

It follows that the problem presented here affects the people of Tennessee as a body politic and sovereign, and is precisely the type of "political thicket" that this Court, in **Colegrove v. Green**, said courts ought not to enter.

The appellants are asking this Court to do indirectly what this Court has said it could not do directly.

The appellants suggest that the Court could enjoin state election officials from holding any future election under the Act of 1901, or that the Court could affirm the District Court's finding that a violation of appellants' rights had occurred and announce its intention to consider at a future date the question of relief.

It is settled beyond doubt, and the appellants must concede, that this Court could not compel the Tennessee legislature to enact new apportionment legislation. To do so would be destructive of tripartite government and would constitute an infringement by the judiciary on the prerogatives of the legislative branch. We submit that the Court should decline to take steps to accomplish this same unconstitutional result by any other affirmative action. If the Court cannot enter through the front door, as it has

clearly said it has no right to do, it should not be asked to enter through the back door.

Clearly, we think, the decisions of this Court declare the problem of reapportionment to be a political question which should be addressed to the people of Tennessee and their General Assembly. The Constitution of Tennessee belongs to its people. They are capable of determining political and governmental issues arising in connection with their state government. They should be permitted to resolve the question of reapportionment in their own way. As this Court said in **Colegrove v. Green**, "the remedy for unfairness in districting is to secure State legislatures that will apportion properly."

Wherefore, the appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the District Court of the United States for the Middle District of Tennessee be affirmed.

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GEORGE F. McCANLESS,
Attorney General of Tennessee,

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MILTON P. RICE,
Assistant Attorney General of Tennessee,

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JAMES M. GLASGOW,
Assistant Attorney General of Tennessee,

.....

JACK WILSON,
Assistant Attorney General of Tennessee,
Attorneys for Appellees.

Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the appellees, hereby certifies that on the ..... day of June, 1960, he served the within and foregoing statement in opposition to the appellants' statement of jurisdiction and motion to dismiss on Charles W. Baker et al., appellants, by depositing at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing statement securely enclosed in an envelope, postage duly prepaid, addressed to one of the attorneys of the appellants, Z. T. Osborn, Jr., Denney, Leftwich & Osborn, Nashville Trust Building, Nashville, Tennessee.

.....

James M. Glasgow,
Assistant Attorney General.

Mailing Address:
Supreme Court Building,
Nashville, Tennessee.

APPENDIX A.

Constitution of Tennessee.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enu-

meration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

APPENDIX B.

Constitution of Tennessee.

Article IV.

Sec. 1. Right to vote—Election precincts—Military duty.—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this State shall be subject to the performance of military duty as may be prescribed by law.